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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-219665; B-219665.2 **DATE:** December 17, 1985

MATTER OF: Sea-Land Service, Inc.

DIGEST:

1. Submission, after best and final offers, of additional evidence of an offeror's financial resources does not constitute improper discussions or require an agency to request revised proposals from all offerors when the information does not affect the acceptability of the proposal but relates to the offeror's responsibility.

2. Agency was not required to amend RFP and solicit a second round of best and final offers based on an increase in the applicability of the Service Contract Act where there was uncertainty whether the additional coverage would be required and agency's analysis of protester's and eventual awardee's proposals indicated competitive standing would not be affected by proposed change.

3. Agency's communication to proposed awardee of potential for expansion in SCA coverage did not constitute "discussions" requiring the reopening of negotiations.

Sea-Land Service, Inc. (Sea-Land) protests the award on August 16, 1985, of a fixed-price contract totaling $30,709,896 to Bay Tankers, Inc., under request for proposals (RFP) No. N00033-85-R-4006, issued by the Military Sealift Command (MSC), Department of the Navy, for the operation and maintenance of four T-AKR Fast Sealift Ships. Sea-Land protested to this Office on August 9, 1985, that the MSC conducted inappropriate discussions concerning Bay Tankers' financial condition after receipt of best and final offers (BAFOs) on July 18, 1985, and allowed that firm to modify its proposal without providing a similar opportunity to other offerors. On September 19, 1985, Sea-Land also protested to this Office that it was

adversely affected by the MSC's inaction on its agency level protest concerning the application of the Service Contract Act to this procurement. We consolidated these individual protests for administrative development and disposition on September 19, 1985.

We deny the protests in part and dismiss them in part.

The Navy sought proposals for the operation and maintenance over a five-year period beginning August 16, 1985, of four T-AKR ships assigned to the Military Sealift Command's Fast Sealift Ships program, a Navy initiative designed to significantly increase the capability for fast sealift of military equipment and supplies from the United States to any overseas area of the world. The solicitation was issued on March 29, 1985, and required offerors to submit three separate proposal segments covering (1) the technical feasibility of the offeror's proposal to maintain and man the ships in a high state of readiness and achieve Full Operational Status for sustained overseas deployment upon short notice; (2) the total cost to the government for the operation of the four Fast Sealift Ships over five years; and (3) the demonstrable managerial capability and resources of the offeror devoted to this program. The solicitation indicated that the cost proposal was more important than technical, and technical was more important than management. By June 12, 1985, the Source Selection Evaluation Board completed its evaluations and a competitive range was established. Negotiations were then conducted with all offerors in the competitive range with BAFOs to be submitted by July 18, 1985. The Source Selection Evaluation Board reevaluated the BAFOs, reassigning grades for each offeror's cost, technical and management categories, and revising a comparative analysis. Applying the predetermined weights prescribed in the Source Selection Plan, Bay Tankers had the best composite score and the lowest price at $30,709,896, and the recommendation of Bay Tankers as the awardee was approved by the Chairman of the Source Selection Advisory Committee. The award was made on August 16, 1985, based on a finding that urgent and compelling circumstances justified the award notwithstanding the protest.

Initially, we note that the MSC has not provided the protester with the complete administrative report. Although the MSC has denied the protester access to its competitor's proposal and to much of the technical evaluation material, it has provided all of the requested material to our Office for our review. Due to the

proprietary nature of much of this material we have reviewed it in camera. Our discussion of its contents, however, is limited because of the restriction on its disclosure. Eaton-Kenway, B-212575.2, June 20, 1984, 84-1 C.P.D. ¶ 649; Robert E. Derecktor of Rhode Island, Inc.; Boston Shipyard Corp., B-211922, B-211922.2, Feb. 2, 1984, 84-1 C.P.D. ¶ 140.

Financial Condition

The Navy reports that in order to protect the government as contemplated by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.104-1 (1984), and in accordance with the terms of the solicitation, the Contracting Officer conducted a preaward survey to determine Bay Tankers' financial responsibility. To this end, a preaward survey team was formed and sent to Bay Tankers' headquarters to examine certain corporate documents on July 31, 1985. Based upon this examination, the preaward survey team recommended that Bay Tankers obtain a line of credit at aproximately $1,226,000 and a letter of credit at $2,363,000, based on the government's analysis of the cash flow requirements necessary to perform this contract. Bay Tankers countered with the suggestion for an irrevocable line of credit for the life of the contract with any drawdowns from this line of credit replaced immediately. The contracting officer analyzed Bay Tankers' suggestion; determined that it was sufficient to protect the government; found Bay Tankers responsible within the meaning of FAR, 48 C.F.R. § 9-104-1, supra; and made award to Bay Tankers on August 16, 1985.

In all government procurements, an offeror's financial condition is a factor in determining contractor responsibility, that is, the offeror's capacity to perform the work. In contrast, evaluation criteria are used to make the graded assessments of the relative merits of individual proposals which form the basis for award. See Delta Data Systems Corp. v. Webster, 744 F.2d 197, 200 (D.C. Cir. 1984), citing Delta Data Systems Corp., B-213396, Apr. 17, 1984, 84-1 C.P.D. ¶ 430, at 5, 6. The protester contends that here the MSC used financial information in its evaluation of the acceptability of Bay Tankers' proposal. Since Bay Tankers' line of credit and letter of credit were essential for finding Bay Tankers' offer acceptable, Sea-Land argues, acceptance of these documents by the Navy constituted improper discussions and a revision of Bay Tankers' proposal.

In support of this allegation, the protester offers the decision of the United States Court of Appeals for the District of Columbia Circuit in Delta Data Systems Corp. v. Webster, supra, as a controlling example of a procuring agency properly considering the financial condition of each offeror to be an evaluation criterion. In upholding the use of offerors' financial strengths in evaluating proposals in the Delta Data case, the court found that an evaluation factor listed in the solicitation, "vendor considerations," was broad enough to include the vendors' financial condition. Sea-Land urges that, like the RFP in the Delta Data case, the RFP for the present procurement provides evaluation criteria which focus on the characteristics of the offeror and encompass its financial condition. For example, Sea-Land points to the "Management" subfactor "Corporate Description" which indicates that the evaluation will be based not only on the manpower and resources dedicated to the performance of this contract but the "additional manpower, expertise and resources available or ability to otherwise obtain additional manpower, expertise and resources if and when needed." Sea-Land concludes that the "resources" referred to here are "financial resources" and therefore the financial condition of each offeror was an essential element of the evaluation scheme. As a result, Sea-Land argues, it was improper for the MSC to discuss with Bay Tankers the firm's financial condition after BAFOs had been submitted, and the protester contends Bay Tankers' revision of its offer with respect to its financial condition should not have been allowed.

The MSC responds that communications with Bay Tankers concerning its financial strength and leading to Bay Tanker's obtaining an irrevocable line of credit related solely to the determination of that proposed awardee's responsibility, and therefore those communications were a proper exercise of the contracting officer's discretion in making determinations of responsibility consistent with FAR, 48 C.F.R. § 9.104-1. The MSC further emphasizes that the "resources" referred to in the "Corporate Description" subfactor of the Management evaluation category were not specifically delineated as financial resources or financial condition, and were neither evaluated by the Management source selection team for financial responsibility nor available for use by any of the other source selection teams.

The MSC further states that certain "Financial Statements" requested by Attachment F to the solicitation

were obtained as a start-off point to facilitate the preaward survey for financial responsibility which was analyzed separately after selection of the apparent successful offeror and before award; thus the solicitation advised offerors that a preaward survey would be conducted when insufficient information was available to the contracting officer to make a responsibility determination. Therefore, the MSC concludes, since the information submitted by Bay Tankers in no way affected that firm's BAFO and did not involve information essential to determining the acceptability of Bay Tankers' offer, no discussions were held within the meaning of FAR, 48 C.F.R. § 15.601 and no new round of BAFOs was required by FAR, 48 C.F.R. § 15.611(c).

Sea-Land's reliance on the Delta Data case for the proposition that financial condition was used to evaluate proposals rather than for the responsibility determination is misplaced. In Delta Data the contracting agency's own conduct in revising proposal scores based on financial data made clear that it was treating financial condition as a matter of proposal evaluation. In contrast here, the MSC did not utilize the financial information for any purpose other than determining contractor responsibility, and at no time did the MSC use the additional financial information provided by Bay Tankers to rescore that firm's proposal. See also Alan Scott Industries, et al., 63 Comp. Gen. 615 (1984), 84-2 C.P.D. ¶ 349, at 13. Sea-Land's protest is based ultimately on its disagreement with the MSC's account of its use of financial information supplied by Bay Tankers. Since Sea-Land has provided no evidence of record to show that the MSC used information on Bay Tankers' financial condition to evaluate that firm's proposal for award under the source selection plan, the protester has failed to meet its burden of proving that the MSC conducted discussions with Bay Tankers after BAFOs.

The factual situation here more resembles that in Uniserv Inc.; Marine Transport Lines, Inc., B-218196; B-218196.3, June 19, 1985, 85-1 C.P.D ¶ 699, in which we held that submission, after BAFOs, of additional evidence of an offeror's financial resources does not constitute improper discussions or require an agency to request revised proposals from all offerors when the information does not affect the acceptability of the proposal but relates to the offeror's responsibility. Here, as in Uniserv, the line of credit was not information essential for determining the acceptability of Bay Tankers' proposal,

and its submission did not constitute discussions between the Navy and Bay Tankers.

Sea-Land's protest on this basis is denied.

Service Contract Act

Sea-Land contends that the MSC should have amended the RFP to reflect an extension of the applicability of the Service Contract Act, and in view of this changed requirement, should have reopened negotations and requested another round of BAFOs.

The Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. §§ 351-58 (1985), applies to contracts in excess of $2,500 "the principal purpose of which is to furnish services in the United States through service employees." 41 U.S.C. § 351(a). When the Act applies to a particular contract, that contract must contain certain provisions, including a provision specifying a minimum level of wages to be paid (41 U.S.C. § 351(a)(1)), a provision specifying a minimum level of fringe benefits to be provided (41 U.S.C. § 351(a)(2)) and a provision specifying that the work environment will meet minimum standards of health and safety (41 U.S.C. § 351(a)(3)). Congress has delegated to the Department of Labor (DOL) the responsibility for enforcing the Act (41 U.S.C. § 353); and pursuant to that delegation, the Secretary of Labor has promulgated administrative regulations to implement the Act which are codified at 29 C.F.R. Part 4.

The RFP indicated that each ship would average 305 days per year--or 85 percent of its time--in reduced operational status (called "ROS days") during which the vessel would be berthed at ports along the United States East and Gulf Coasts, ready to achieve the transition to full operational status within 96 hours. During this period, according to the solicitation, the SCA would be applicable. During the remaining 60 days of full operational status (called "FOS days") while the vessel is operating at sea or is fully prepared to get underway to accomplish its mission, the vessel would be expected to be outside United States territorial waters and therefore the SCA would not apply. However, the MSC also anticipated that during the 60-day fully operational period each ship would spend about 21 days transiting United States territorial waters enroute to foreign trade.

Sea-Land asserts that after BAFOs had been submitted but before award, DOL and the MSC determined that the applicability of the SCA would be extended to those periods when the ships were in fully operational status but transiting United States waters en route to foreign trade. The solicitation should have been amended to reflect this determination, Sea-Land contends, and offerors given the opportunity to submit a second BAFO in light of these changed requirements.

In this case, there was not a final DOL wage determination applicable to the portion of contract coverage in issue here before BAFOs were submitted on July 18, 1985. This follows from the fact that the previously binding regulation, 29 C.F.R. § 4.112(b), applying to service contracts which will be performed only partially within the United States was invalidated by the March 22, 1985, decision of the United States Court of Appeals for the District of Columbia in the case of AFL-CIO v. Raymond J. Donovan, 757 F.2d 330 (D.C. Cir. 1985). During the period after this solicitation was issued on March 29, 1985, and through receipt of BAFOs on July 18 and award to Bay Tankers on August 16, the record shows that the MSC and the DOL were engaged in continuing discussions concerning the applicability of the SCA to "FOS days" while ships were in United States territorial waters. Although the DOL now considers that the Act should apply in those circumstances, and the MSC informed Bay Tankers of the DOL's view, the MSC maintains that it has not adopted the DOL view generally nor incorporated it into the contract with Bay Tankers because the question of the Act's extended coverage is presently being litigated. On July 29, 1985, before award of this contract on August 16, the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO (SIU) filed Civil Action No. 85-1423 in the United States District Court for the District of Columbia contesting the MSC's failure to apply the SCA for that portion of time--such as the 21-day period in question here--that a ship operated under an MSC contract is transiting United States territorial waters. Although this litigation does not involve Fast Sealift Ships, our review of the complaint shows that this aspect of Sea-Land's protest is a material issue in that pending litigation.

The MSC further states that in view of the unsettled issue of SCA applicability to periods when contract operated ships are in United States waters, other procurements have been delayed pending the results of the SIU litigation cited above. In the present case, however, the

MSC determined that urgent and compelling reasons based on national security interests necessitated award of the contract. The MSC reports that it analyzed the effect of applying the SCA to the additional 21 "FOS days" (an additional 5.6 percent coverage) by comparing offerors' proposed wage rates and current SCA wage rates for the 305-day (85 percent) period of reduced operational status specified in the RFP. The MSC concluded that extending the application of the SCA by 5.6 percent would have a minimal impact on competitive pricing, and no impact on competitive placement, and thus the best interests of the government would be served by an award to Bay Tankers.

The solicitation, as issued, clearly contemplated that the SCA would be applicable only to ROS periods. Approximately 3 months after the solicitation was issued, DOL wrote the MSC and advised that based upon information from the Seafarers International Union, it appeared that the MSC "may be applying an inappropriate standard for determining SCA coverage of certain contract specifications." Discussions between DOL and the MSC ensued although, as the MSC points out, even as of the time of its October 25 report to our Office no final determination had been made as to the applicability of the SCA to FOS days in United States territorial waters. In the meantime, the identical issue was raised in the suit filed by the SIU on July 29.

Under these circumstances, there was sufficient uncertainty as to the exact extent of the applicability of the SCA that the MSC did not act unreasonably in not incorporating the additional coverage into the RFP and reopening negotiations and requiring another round of BAFOs based on it. In addition, it appears from the analysis performed by the MSC that the relatively limited additional SCA coverage at issue here would not have affected the competitive positions of Bay Tankers and Sea-Land. We therefore deny Sea-Land's protest insofar as it contends that the MSC was required to amend the RFP and reopen discussions for purposes of extending the applicability of the SCA.

Sea-Land next argues that regardless of whether the MSC was legally obligated to revise the RFP to reflect expanded application of the SCA, the MSC nevertheless had "discussions" with Bay Tankers regarding the SCA after receipt of BAFOs. Since the MSC discussed the issue with Bay Tankers, the protester contends, it was obligated to reopen negotiations and provide all offerors remaining in the competitive range an opportunity to submit a new best and final offer.

In support of this contention Sea-Land points to the following exchange of telexes on August 15, 1985, as evidence that the MSC held discussions with Bay Tankers regarding the extended applicability of the SCA after receipt of BAFOs. The first telex from the MSC to Bay Tankers states as follows:

> " . . . The Department of Labor has indicated that the Service Contract Act applies during Full Operating Status (FOS) days performed within the United States as [defined] by the Act. Please confirm ASAP Bay's agreement to so apply the Service Contract Act. . . . To the extent, compliance with the SCA increases Bay's labor costs, the Government agrees to equitably adjust your contract price, as necessary, to reimburse those additional costs."

Later in the day Bay Tankers responded as follows:

> "Bay hereby confirms your understanding, that the Service Contract Act will apply during Full Operating Status days performed within the United States as defined by the Act. . . . It is acceptable to Bay to be reimbursed by the Government for such additional costs as necessary."

Sea-Land asserts that these preaward communications regarding the possible extended application of the SCA had the effect of varying the terms of the RFP and allowing Bay Tankers to revise its proposal; and as such these communications constituted "discussions" within the meaning of FAR, 48 C.F.R. § 15.601. If discussions were reopened with Bay Tankers, Sea-Land contends, under FAR, 48 C.F.R. § 15.611(c), all offerors still within the competitive range should have been asked to submit a new BAFO.

The MSC emphasizes that it still does not have a DOL wage determination which applies the SCA to those periods when the Fast Sealift Ships are on full operational status in United States waters; but when such a final determination is received, the MSC will implement that determination. Similarly, should the courts resolve that the SCA does apply to the "FOS days" while contract ships are transiting United States waters, the MSC will issue an appropriate modification during its administration of the contract. Thus the MSC states that the telex merely

reminded Bay Tankers that it was required to comply with the full extent of the Service Contract Act while informing that firm the government would pay any resulting differential during the administration of the contract.

FAR, 48 C.F.R. § 15.611(c), and our decisions require that, if discussions are reopened with one offeror after the receipt of BAFOs, they must be reopened with all offerors in the competitive range and an opportunity given to submit revised proposals. Electronic Data Systems Federal Corporation, B-207311, Mar. 16, 1983, 83-1 C.P.D. ¶ 264 at 7. However, an agency may contact an offeror to clarify uncertainties or irregularities so long as that offeror is not given an opportunity to make modifications or revisions of its proposal which would be essential to a determination of its acceptability. Id. The remaining issue is whether the MSC was conducting discussions designed to elicit new information essential to determining the acceptability of Bay Tankers' proposal, or whether it was merely effecting an administrative clarification.

The RFP instructed all offerors to calculate prices based on SCA DOL wage determination coverage for the 305-day period when the ships would be in a reduced operational status, but not for any period of days when the ships would be in full operational status. Following submission of BAFOs and during a period when on-going discussions with DOL and pending litigation indicated to MSC that it may have to expand SCA coverage by 5.6 percent, the MSC contacted Bay Tankers. The MSC message speculated on the potential for expanded SCA coverage, and acknowledged that, as a future matter, if there should be an expansion in SCA coverage, the government would reimburse the contractor for any corresponding cost increases. Bay Tankers responded that it would comply with the full extent of the law. We find nothing in this exchange that would show that Bay Tankers was asked to, allowed to, or required to revise its BAFO in any way. Nor do we find that the information imparted by Bay Tankers, that is, its intent to comply with the law, was at all revisionary or was otherwise "essential for determining the acceptability" of its proposal as contemplated by the definition of "discussions" in FAR, 48 C.F.R. § 15.601.

Our review of the record does not show that Bay Tankers revised its BAFO prior to award on August 16, 1985, or that the contract awarded to Bay Tankers has been modified to reflect any change in SCA coverage. Moreover, Sea-Land has not shown how Bay Tankers changed its offer in

response to this information, or demonstrated that these communications were necessary to make Bay Tankers' BAFO acceptable. We find no prejudice to Sea-Land in the MSC's actions regarding the unsettled issue of expanded SCA coverage, and we conclude that the telexes exchanged by the MSC and Bay Tankers on August 15, 1985, must be viewed as informational communications clarifying a potential future matter of contract administration and not as "discussions" within the meaning of FAR, 48 C.F.R. § 15.601, which would have required the reopening of negotiations and a new round of BAFOs consistent with FAR, 48 C.F.R. § 15.611(c). Thus, the communications were permissible under the FAR and provide no ground for sustaining the protest.

Other Allegations

In comments filed with this Office on September 25, 1985, following a conference on the merits of Sea-Land's protest that communications between MSC and Bay Tankers regarding additional financing constituted improper discussions, the protester generally contends that the Navy may have "deviated from proper and prescribed procurement procedures" when, on August 16, 1985, the Commander of the Military Sealift Command made a written determination that there were urgent and compelling circumstances justifying the award of the contract notwithstanding the instant protest. Although Sea-Land charges the agency with procurement "short cuts," its observations fall short of any allegation of bias on the part of agency officials or that the justifications offered were invalid. Rather, Sea-Land appears concerned about the untoward "haste" with which the MSC acted in making award of this contract. This argument is unsubstantiated speculation that appears to be no more than disagreement with the result of the procurement and is not supported by the record in this case. It is dismissed accordingly.

Sea-Land then speculates whether the MSC may have "diluted" its consideration of the technical and management proposal evaluation factors with the result that cost became the "sole" criterion for award. The protester states that it is "critically important" for our Office to review the evaluation of proposals to insure that this did not in fact occur. We think the protester's essentially unsupported speculation does not warrant such a review.

In its letter of September 25, the protester also asserts that the MSC should have rescored proposals prior to making award in order to take into account the impact of

the alleged expansion of the applicability of the SCA and, with regard to Bay Tankers, the effect of its financial condition upon its technical and management proposals.

This is a new ground for protest not previously raised in conjuction with the principal issues discussed above, although we know of no reason why it could not have been. It is therefore untimely. See 4 C.F.R. § 21.2(a)(2). Moreover, in view of the conclusions we have expressed concerning the principal issues, we clearly would not agree that a rescoring of proposals was required.

Finally, in comments filed on November 7, 1985, the protester alleges that the MSC and Bay Tankers held "discussions" on subjects other than financial matters and the SCA. The basis for this allegation is a letter sent by the contracting officer to Bay Tankers after BAFOs had been submitted. In this letter, the contracting officer specifically referred to FAR, § 15.607, which permits contracting officers to communicate with offerors to resolve minor informalities or irregularities and which provides that such communications are "clarifications," not "discussions." The contracting officer then requested Bay Tankers to "confirm" its offer "with yes/no answers" to a series of questions as to Bay Tankers' "understanding" of certain matters. The protester asserts that when it omitted certain information in its proposal concerning one of these matters, the MSC treated it as a "deficiency" to be addressed during negotiations. The protester asserts that it is incongruous for the MSC, in later confirming Bay Tankers' understanding of the same subject, to regard it as a "clarification."

It appears that the Navy provided the protester with a copy of the contracting officer's letter, in response to a Freedom of Information Act request, approximately a month before the protester's November 7 letter was filed with us. This aspect of the protest is therefore untimely. See 4 C.F.R. § 21.2(a)(2).

The protest is denied in part and dismissed in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel